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No. 91-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

HOLLAENDER MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Once an employer is found by the National Labor Relations Board (NLRB) to have unlawfully withdrawn recognition from an incumbent union, may the NLRB order the employer to continue recognizing the Union where, subsequent to and independent of the employer's withdrawal of recognition, an uncoerced majority of the employees no longer wish to be represented by the Union?

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No. 91-

In The

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October Term, 1991

HOLLAENDER MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner requests that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on August 13, 1991, enforcing a Decision and Order of the National Labor Relations Board (hereinafter "NLRB") directing Petitioner to continue recognizing and bargaining with the International Association of Machinists and Aerospace Workers, Local Lodge 789, District 34 (hereinafter "the Union").

OPINIONS BELOW

The opinion of the Court of Appeals is contained in the Appendix at 1a, and is reported at 942 F.2d 321 (6th Cir. 1991). The opinion of the NLRB is contained in the Appendix at 18a, and is reported at 299 N.L.R.B. No. 59.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1991. A Petition for Rehearing *en banc* was timely filed by Petitioner on August 27, 1991. The Petition for Rehearing *en banc* was denied on October 1, 1991. Jurisdiction to review the judgment of the Sixth Circuit in this cause by a Writ of Certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

National Labor Relations Act of 1935, as amended (29 U.S.C. 151, *et seq.*)

§ 158 – *Unfair Labor Practices*

(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 159(a) of this title.

§ 159 – *Representatives and Elections*

(a) *Exclusive representatives', employees' adjustment of grievances directly with employer.*

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

§ 160 – *Prevention of Unfair Labor Practices*

* * *

(c) *Reduction of testimony to writing, findings and orders of Board.*

The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If, upon the preponderance of the testimony taken,

the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back.pay, as will effectuate the policies of this subchapter.

STATEMENT OF THE CASE

The basic facts of this case, as set forth fully in detail in the Sixth Circuit and NLRB Opinions, are not in dispute. Petitioner is engaged in the manufacture and sale of structural fittings from its manufacturing facility in Evendale, Ohio. Petitioner and the Union enjoyed long and harmonious bargaining relations since the Union was certified in 1965 as the exclusive bargaining representative for the Petitioner's production and maintenance employees. The most recent three-year collective bargaining agreement expired on May 31, 1989.

On Friday, May 5, 1989, Petitioner was furnished a petition signed by 16 out of 30 employees stating that they no longer wanted the current Union to represent them for purposes of collective bargaining. The circulation of the anti-Union petition was carried out in an atmosphere free from coercion or interference by Petitioner. Based on receipt of the anti-Union petition, Petitioner, on Monday, May 8, 1989, withdrew recognition from the Union and refused to bargain over a new contract.

Subsequently, the Union filed unfair labor practice charges against Petitioner alleging that it unlawfully withdrew recognition from the Union at a time in which it still represented the majority of the production and maintenance employees at Petitioner's facility. The NLRB Cincinnati Regional Office ultimately issued a complaint alleging that Petitioner violated § 8(a)(5) of the National Labor Relations Act [29 U.S.C. § 158(a)(5)] by withdrawing recognition from the Union at a time in which it still represented a majority of the employees.

On September 8, 1989, an Unfair Labor Practice Hearing was held before an Administrative Law Judge appointed by the NLRB, whereafter the Administrative Law Judge ruled that the employer had unlawfully withdrawn recognition from the Union on May 8, 1989, because at that time, there were 34, not 30 members of the bargaining unit. The Administrative Law Judge ruled that the bargaining unit should have included four (4) probationary employees. Therefore, the 16 signatures on the anti-Union petition did not represent a majority of bargaining unit employees no longer desirous of Union representation. The Administrative Law Judge further recommended the issuance of a remedial order requiring Petitioner to continue bargaining with the Union over a new collective bargaining agreement even though within a few weeks after the unlawful withdrawal of the recognition on May 8, 1989, and prior to the Hearing, three (3) probationary employees and three (3) permanent employees who had not signed the anti-Union petition left the employment of the Petitioner,[1] thereby rendering

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[1] Two of the probationary employees quit within a couple of hours after the May 8, 1989, withdrawal of recognition.

the 16 employees who originally signed the anti-Union petition an uncoerced majority in a bargaining unit of 28 employees.[2]

On August 16, 1990, the NLRB issued its opinion adopting *in toto* the decision of the Administrative Law Judge as well as her recommended bargaining order remedy without comment.

On October 15, 1990, the NLRB filed with the United States Court of Appeals for the Sixth Circuit its Application for Enforcement of its Order. After briefing and argument, the Court of Appeals rendered its opinion and judgment on August 13, 1991, affirming in its entirety the Decision and Order of the NLRB including its remedy requiring the Petitioner to continue recognizing and bargaining with the Union.

The Court of Appeals agreed with the NLRB that even though a majority of the employees may have no longer wanted the Union to represent them, the fact that the Petitioner had unlawfully withdrawn recognition from the Union at a time a majority of employees still supported the Union rendered a remedial bargaining order absolutely necessary to restore as far as possible the *status quo* that existed prior to the alleged withdrawal of recognition. The Court deferred to the NLRB's choice of remedies, acknowledging NLRB's broad discretion which was subject to very limited judicial review.

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[2] While one employee withdrew his name subsequently, another employee added her name to the Petition at about the same time.

Petitioner filed a Motion for Rehearing *en banc*, on August 27, 1991, which was denied by the Sixth Circuit Court of Appeals on October 1, 1991.

ARGUMENT

I. REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

This case presents a labor issue of first impression, namely, to what extent the NLRB may order an employer, who unlawfully withdraws recognition from the majority union, to continue to recognize and bargain with that union where, subsequent to, and unrelated to, the withdrawal of recognition, an uncoerced majority of employees no longer wish the union to represent them.

The United States Supreme Court has ruled that an employer violates § 8(a)(2) of the National Labor Relations Act, [29 U.S.C. § 158(a)(2)] when it recognizes and bargains with a union which does not, in fact, represent a majority of the bargaining unit employees. *Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961). *Bernhard-Altmann* involved a non-union employer who, faced with an initial organizational campaign, unlawfully recognized the union under a good faith belief that the union represented an uncoerced majority of the employees when, in fact, it did not. The *Berhard-Altmann* rule proscribing employer recognition of a so-called "minority" union has never been extended to a withdrawal-of-recognition case like the one at bar where the Sixth Circuit has enforced an NLRB order that

an employer recognize a union which used to represent a majority but no longer does.

Furtherm re, the decision of the Sixth Circuit Court of Appeals in the instant case is in direct conflict with decisions of the District of Columbia, First, and Fifth Circuits. Those courts, when faced with substantially similar factual situations, have refused to enforce NLRB remedial bargaining orders in the face of an uncoerced majority of employees who no longer want the union to represent them. In *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), the District of Columbia Circuit Court of Appeals, while finding that an employer had unlawfully withdrawn recognition from a union at a time in which it still represented a majority of the employees in the bargaining unit, nonetheless refused to enforce the NLRB's remedial order on the basis that subsequent to the withdrawal of recognition, a clear majority of the employees exhibited an uncoerced desire that the union no longer represent them. The Court reasoned that the NLRB's choice of bargaining order remedy gave too much weight to the interests of the union and too little weight to the statutory rights of the employees to reject their bargaining representative and to refrain from collective bargaining. *Id.*, at 45-48; See also, *St. Agnes Medical Center v. NLRB*, 871 F.2d 137 (D.C. Cir. 1989). The First Circuit Court of Appeals recently ruled in *NLRB v. LaVerdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991), that a remedial bargaining order that refuses to take into consideration the employees' desires to be free of union representation should not be enforced. *Accord, Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398 (5th Cir. 1991).

Section 10(c) of the National Labor Relations Act [29 U.S.C. § 160(c)] clothes the NLRB with broad remedial authority subject to the proviso that whatever remedy is chosen must "effectuate the policies of this [Act.]" *Id.* The Supreme Court has acknowledged the NLRB's wide discretion in fashioning its remedies, given its unique expertise in the area of industrial relations, *Shepard v. NLRB*, 459 U.S. 344, 349 (1983); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). The Court, however, has refused to enforce NLRB remedial orders when they frustrate or run counter to the clearly-established purposes of the underlying statute. See e.g., *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1980); *Cf. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983). Employee disaffection with unions has been a common phenomenon in industrial relations in recent years. It manifests itself in spontaneous circulation of anti-union petitions or other attempts by employees to effectuate their employer's withdrawal of recognition from the union. By failing to take into consideration this growing anti-union majority in cases such as the one at bar, and foisting unions on employees who no longer want them, the Sixth Circuit Court of Appeals would enforce an NLRB remedial order totally at odds with the underlying statutory purpose of the National Labor Relations Act, to protect employee free choice.

II. QUESTION PRESENTED FOR REVIEW

Once an employer is found by the National Labor Relations Board (NLRB) to have unlawfully withdrawn recognition from an incumbent union, may the NLRB

order the employer to continue recognizing the union where, subsequent to and independent of the employer's withdrawal of recognition, an uncoerced majority of the employees no longer wish to be represented by the union?

A. FOR ALL RELEVANT TIMES, SUBSEQUENT TO THE UNLAWFUL WITHDRAWAL OF RECOGNITION BY THE PETITIONER ON MAY 8, 1989, AN UNCOERCED MAJORITY OF EMPLOYEES HAVE EXPRESSED A DESIRE TO NO LONGER BE REPRESENTED BY THE UNION.

It is well-settled federal law that a fundamental predicate for the NLRB's issuance of a remedial bargaining order is the existence of an uncoerced majority of employees who wish the Union to represent them for the purposes of collective bargaining. *Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Curtin Matheson Scientific, Inc.*, ___ U.S. ___, 110 S.Ct. 1542 (1990). However, in the absence of a clear, uncoerced majority of employees supporting representation by the union, federal courts generally hold that bargaining orders are clearly inappropriate. *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1981); *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974). This majoritarian principle obtains both in the context of an initial organizational campaign where the union is attempting to represent employees for the first time in a bargaining unit, *Gissel, supra; Pace Oldsmobile, supra*, and in the context of a withdrawal of recognition, present here, where the question is whether the majority of the employees still wish to be represented by the

incumbent union. *Curtin Matheson, supra; Automated Business Systems, supra.*

In the instant case, at the time of the withdrawal of recognition from the Union on May 8, 1989, only a minority of employees, 16 out of 34, signed the anti-Union petition. However, it is also uncontroverted that within a few weeks of the withdrawal of recognition, a sufficient number of non-petition signers left employment of Petitioner that the solid nucleus of sixteen anti-Union employees became a clear majority in the existing bargaining unit of 28 employees.

More importantly, there is no causal relationship between Petitioner's withdrawal of recognition on May 8, 1989, and the subsequent manifestation of majority employee discontent with the Union. The 16 employees who signed the anti-Union petition did so *before* the Petitioner withdrew recognition from the Union in an atmosphere free of Petitioner's interference and coercion. These 16 employees remained anti-Union afterwards. Other employees subsequently left the employment of Petitioner, for reasons unrelated to the withdrawal of recognition. Thus, the emergence of an uncoerced anti-Union majority occurred despite the withdrawal of recognition, and not because of it.

B. IF THE SIXTH CIRCUIT'S ENFORCEMENT OF RESPONDENT'S REMEDIAL BARGAINING ORDER IS ALLOWED TO STAND, PETITIONER WILL BE FORCED TO RECOGNIZE AND BARGAIN WITH A UNION AGAINST THE WISHES OF A MAJORITY OF THE BARGAINING UNIT EMPLOYEES, THEREBY VIOLATING § 8(a)(2) [29 U.S.C. § 158(a)(2)] OF THE NATIONAL LABOR RELATIONS ACT.

In *Bernhard-Altmann, supra,* the Supreme Court ruled that an employer violates § 8(a)(2) of the National Labor Relations Act [29 U.S.C. § 158(a)(2)] when extending recognition to a union which in reality does not represent a majority of the bargaining unit employees, even if the employer believed in good faith that it did. By extending recognition to such a "minority" union, the employer unlawfully assists the union. *Bernhard-Altmann* arose, of course, in the context of an initial organizational campaign. However, the Supreme Court has extended its reasoning to a successorship case. *Fall River Dyeing and Finishing Corp. v. NLRB,* 482 U.S. 27 (1987). The issue in *Fall River Dyeing* was the extent to which an employer who purchased the assets of a unionized predecessor employer was obligated to bargain with the incumbent union. The Court, relying on *Bernhard-Altmann,* ruled that until a representative complement of employees was hired by the successor, and it was determined that the majority of that complement was composed of ex-employees of the unionized predecessor, the successor employer would be precluded from recognizing the union. *Id.* at 51, n.18.

The holding of *Bernhard-Altmann* has never been extended to the withdrawal-of-recognition situation obtaining in the instant case. However, given the overriding public policy objective of the National Labor Relations Act to preserve the right of employees to freely choose whether or not they wish to be represented by unions for purposes of collective bargaining, there is no basis for limiting the applicability of *Bernhard-Altmann* to an organizational or successorship case. Indeed, if a petition for a writ of certiorari is not granted, and if the Sixth Circuit's enforcement of the NLRB's remedial bargaining order is allowed to stand, the Petitioner will be forced to do exactly what *Bernhard-Altmann* prohibits him from doing: recognizing and bargaining with a union which is not supported by the majority of the bargaining unit employees.

C. THE SIXTH CIRCUIT'S DECISION IS UNSUPPORTED BY THE AUTHORITIES UPON WHICH IT RELIES.

The Sixth Circuit Decision in this case relies very heavily on the forty-seven year old decision of the Supreme Court in *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). However, such reliance is misplaced. In *Franks Bros.*, the union's majority was dissipated in the wake of several acts of employer misconduct violative of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act. [29 U.S.C. §§ 158(a)(1) and (a)(3)]. In the wake of these unfair labor practices, several Union employees resigned or otherwise left the employment of the Company and were replaced by individuals whose Union sympathies

were unknown. The Court held that it would be unfair in that situation to expect the union to maintain its majority status over such a long period of time. In fact, it ruled that individuals who replace these employees would vote for the union in the same proportion as the incumbent employees who initially supported the union.

Franks Bros. reflects an altogether reasonable apprehension on the part of the Sixth Circuit that employee disaffection from a union in the wake of an employer's unfair labor practices is oftentimes the result of those very unfair labor practices. Thus, to exonerate the employer from bargaining with the union which once represented a majority of the employees would in effect allow the employer to profit from its own misconduct. In its brief in opposition to certiorari, Respondent, too, may rely upon *Franks Bros.* and other cases cited in its brief to the Sixth Circuit Court of Appeals in support of its bargaining order remedy. See, e.g., *NLRB v. Katz*, 369 U.S. 736 (1962); *Sterling Processing Corp.*, 291 N.L.R.B. 208 (1988). All of these cases involve the very typical scenario wherein the loss of the Union's majority was the result of independent egregious unfair labor practices. Respondent and the federal courts correctly forbade employers from relying on the resultant employee disaffection as an excuse for refusing to bargain. Petitioner does not quarrel with this line of cases or the rationale contained therein.

However, what sets the instant case apart is that Petitioner did *not* commit independent unfair labor practices which caused or contributed to the Union's loss of majority. Petitioner did *not* promise benefits, cut benefits, discharge employees, etc., any or all of which may have influenced employees to sign the anti-Union petition on

May 5, 1989. On the contrary, the circulation of the anti-Union petition and the execution of the petition by 16 employees took place *prior to* the withdrawal of recognition, in an atmosphere free of illegal coercion and interference by Petitioner. Moreover, the same employees remained anti-Union long after the withdrawal of recognition took place.

To be sure, if Petitioner was relying on additional employees who signed the Petition after its withdrawal of recognition of the Union, it might arguably be profiting by its own misconduct. However, the 16 employees signed the anti-Union petition prior to the withdrawal of recognition. Therefore, cases like *Franks Bros.*, *Katz*, and *Sterling* are clearly inapposite.

D. THE SIXTH CIRCUIT'S ENFORCEMENT OF THE RESPONDENT'S BARGAINING ORDER, WHICH GAVE INSUFFICIENT WEIGHT TO THE EMPLOYEES' DESIRES, IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Respondent's approach to this case was to focus only on May 8, 1989, the date of withdrawal of recognition and automatically issue a bargaining order, notwithstanding all events occurring afterwards, even hours later. Respondent, without much forethought, ruled that once there was a withdrawal of recognition, a bargaining order was the only remedy to restore the *status quo*. Indeed, the Respondent noted that "it is difficult to conceive of any other remedy." (Appendix at 37a). The Sixth Circuit Court of Appeals, in enforcing the Board's remedy with minimal comment, again alluded to "need to restore the *status*

quo." (Appendix at 17a). This inflexible, mechanical approach in granting bargaining orders appears to be that of the Ninth Circuit as well. *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1448 (9th Cir. 1991).

However, federal appeals courts of other circuits have rejected such rigid guidelines for granting bargaining orders. They have refused to enforce NLRB bargaining orders which fail to give sufficient weight to events which take place *after* the unlawful withdrawal of recognition, namely, the extent to which an uncoerced majority of employees no longer wish the union to represent them.

In *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), the District of Columbia Circuit Court of Appeals refused to enforce an NLRB bargaining order which failed to take into consideration the fact that subsequent to withdrawal of recognition, the uncoerced majority of employees voted against continued union representation in an election requested by the union itself. While the bargaining order effectively punished the employer for wrongfully withdrawing recognition in the first place, and served the interests of the union which wished to preserve its bargaining status, the issuance of a bargaining order, the Court reasoned, gave too little weight to the statutory rights of employees to select for themselves whether or not they wanted continued union representation. *Id.*, at 45-50. The rationale of *Peoples Gas* has been reaffirmed by the D.C. Circuit Court in *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 147-149 (D.C. Cir. 1989).

Similarly, in *NLRB v. LaVerdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991), the First Circuit Court of Appeals, facing a fact situation which is almost identical to the one at hand, again refused to enforce the NLRB's bargaining order, since it took insufficient account of employees' anti-union sentiment. The First Circuit relied heavily on the fact that employee anti-union sentiment did not evolve in the wake of the unlawful withdrawal of recognition, but had manifested itself in a decertification effort by anti-union employees prior to the employer's withdrawal of recognition. The First Circuit also took note of the *de minimis* nature of the employer's unfair labor practice (mere withdrawal of recognition) and the lack of egregious coercive misconduct directed at the employees. The Court thus could not justify the issuance of a bargaining order as a deterrent measure against the employer. *Id.*, at 1053-1055.

This requirement to consider uncoerced employee sentiment when fashioning bargaining orders has been echoed by the Fifth Circuit as well. *See Texas Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 406 (5th Cir. 1991).

In the final analysis, the appropriateness of a bargaining order depends on a balancing of a triad of interests: (1) deterring employers from embarking on a course of unfair practices designed to dissipate employee support for the union; (2) protecting the status of the union as the collective bargaining representative in the wake of passage of time and loss of employee support caused by employer's unfair labor practices and, finally (3) safeguarding the interests of employees in exercising their uncoerced freedom of choice as to whether they continue to want a union to continue to represent them.

The ruling of the Sixth Circuit below and the Ninth Circuit in *Bakers of Paris, Inc., supra,* focuses exclusively on the first two interests to the exclusion of the third. The Sixth and Ninth Circuits blindly enforce NLRB bargaining orders whenever the employer unlawfully withdraws recognition from the union. The Sixth and Ninth Circuit pay no attention to events that take place subsequent to the withdrawal of recognition, most notably, the uncoerced views of the employees themselves.

The First, Fifth and D.C. Circuits, on the other hand, require the Board to take into consideration the uncoerced view of the majority of the employees, both before and after the unlawful withdrawal of recognition, in determining whether the Board's bargaining order should be enforced.

Given this sharp conflict between the Circuits as to enforcement of bargaining orders, this Court should grant Petitioner's Petition for Writ of Certiorari to resolve this conflict and adopt the reasoning of the First, Fifth and D.C. Circuits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

J-2974
No. 90-6288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	ON APPLICATION FOR
	)	Enforcement of an Order
PETITIONER,	)	of the National Labor
	)	Relations Board
v.	)	
	)	
HOLLAENDER MANUFACTURING COMPANY,	)	
	)	
RESPONDENT.	)	

Decided and Filed August 13, 1991

Before: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Petitioner National Labor Relations Board (hereinafter "Board") seeks enforcement of its August 16, 1990 order entered against respondent Holaender Manufacturing Company (hereinafter "Hollaender"). For the following reasons, we enforce the Board's order.

I.

Hollaender manufactures structural fittings at its manufacturing facility in Evendale, Ohio. International

Association of Machinists and Aerospace Workers (Local Lodge 789, District 34) (hereinafter "Union") has been the certified collective bargaining representative of Hollaender's production and maintenance employees since December 1965. Since 1965, the parties have entered into a series of successive collective bargaining agreements. Because the most recent three-year collective bargaining agreement (hereinafter "agreement") expired on May 31, 1989, Hollaender and the Union agreed to begin labor negotiations on May 8, 1989.

On May 2 or 3, 1989, Phyllis Dugger (a Hollaender employee and Union member) telephoned the Board's office in Cincinnati to ascertain how to decertify the Union at Hollaender. After learning from Dugger that there were thirty (30) Union members at Hollaender, the unidentified Board official purportedly told Dugger that she needed to obtain ten (10) signatures on a decertification petition to initiate decertification proceedings. Consequently, on May 5, 1989, Dugger circulated a petition which read (in its entirety):

> DECERTIFICATION
>
> We the undersigned are rejecting Local Union 787 [sic]. We no longer want them to represent us, the Hollander [sic] Manufacturing Inc., employee [sic].

Joint Appendix at 121.

After asking at least 23 of the 30 Union members to sign the petition, Dugger obtained 16 signatures. Though Dugger solicited signatures in the presence of the four probationary production and maintenance employees,

Dugger did not attempt to obtain the probationary employees' signatures because Dugger did not believe that the probationary employees were part of the certified bargaining unit which the collective bargaining agreement defined as:

> All production and maintenance employees of the Company at its plant and operations located at 10285 Wayne Avenue, Cincinnati, Ohio, 45215, including truckdrivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, guards and professional employees and supevisors [sic] as defined in the Act.

Join Appendix at 86.

The agreement between Hollaender and the Union defined the status and rights of probationary employees in Article XIII ("Seniority"):

> 13.8 During the first three (3) months of continuous employment, a new employee shall be considered a probationary employee; he shall not be entitled to any of the benefits of this contract other than the wage rates, and his employment may be terminated at any time during such period. At the end of the probationary period he shall acquire seniority as of the date of his latest hiring.

and Article XXIV ("Union Shop"):

> 24.2 Newly hired employees shall, as a condition of employment during the term of this Agreement, become and remain members of the Union in good standing thirty (30) days after the date of their employment by the Company.

Despite the express wording of section 24.2 of the agreement, however, the parties stipulated to the truth, but not to the relevance, of the following statement: "In practice, and notwithstanding the provisions of the Union Security Clause, employees were not requested to join the Union until after they had completed their 90-day probationary period." Joint Appendix at 51. Moreover, the parties stipulated "[t]hat the probationary employees perform the same kind of work as the (non-probationary) production employees." Joint Appendix at 37.

After obtaining the sixteen signatures, Dugger apparently placed a copy of the anti-Union petition on Foreman Marvin Kates' desk where it was discovered by Production Manager Gary Thomas. Thomas subsequently telephoned Hollaender's labor attorney, Donald B. Hordes, for guidance. When asked by Hordes how many employees were in the bargaining unit, and how many employees had signed the decertification petition, Thomas responded that sixteen of Hollaender's thirty production and maintenance employees in the bargaining unit had signed the petition. Believing that a majority of the bargaining unit employees had repudiated the Union's authority, Hordes advised Thomas that the company was no longer obligated to recognize and bargain with the Union.

On May 8, 1989, Hordes (operating under the assumption that probationary employees need not be counted when determining the total number of bargaining unit employees) informed the Union representatives that Hollaender would no longer bargain with the Union in light of the decertification petition. Subsequent to the May 8 meeting: three of the four probationary employees

separated from Hollaender under unspecified circumstances; one employee removed his name from the decertification petition; and, one employee added her name to the decertification petition.

On May 9, 1989, Hollaender management circulated a notice, signed by Hollaender's Executive Vice-President and General Manager A. David Echert, to all production and maintenance employees which read (in its entirety):

> To all of the Hollaender Mfg. Co. shop employees:
>
> On Friday, May 5, 1989, we received a petition signed by a majority of you stating that you no longer wanted the Machinists Union to represent you for the purposes of collective bargaining.
>
> Based on this employee sentiment, we informed the union at our first bargaining session on Monday, May 8, 1989 that we were now unwilling to enter into negotiations for a new labor agreement.
>
> We will, of course, continue to abide by the current union contract which expires on May 31, 1989. After that time, however, we will no longer recognize the Machinists Union as your bargaining representative.
>
> One immediate consequence of all of this is that effective June 1, 1989, we will no longer be deducting union dues of $20.15 per month from your pay check. Secondly, we will implement a new salary package for all of our machine shop employees which will be competitive with other similar companies in the Cincinnati metropolitan area, and which also recognizes your

> past and current contributions to The Hollaender Mfg. Co.
>
> YOU WILL NOT LOSE ANY OF THE SALARY AND FRINGE BENEFITS YOU CURRENTLY ENJOY.
>
> We will provide further details concerning your salary and benefits in the next couple of weeks.
>
> In the meantime, thanks for your continued patience and support.

THE HOLLAENDER MFG. CO.

A. DAVID ECHERT

Executive Vice-President and General Manager Joint Appendix at 81.

On May 24, 1989, the Union filed a charge against Hollaender with the National Labor Relations Board for refusing to recognize the Union's representative status. On July 12, 1989, the Board issued its "Complaint and Notice of Hearing" alleging that Hollaender violated Section 8(a)(1) and (5) of the National Labor Relations Act by withdrawing recognition from, and refusing to bargain with, the Union.

On January 10, 1990, Administrative Law Judge Nancy Sherman (hereinafter "ALJ") issued her Decision ordering Hollaender to "recognize and bargain collectively" with the Union "as the exclusive bargaining representative of Respondent's employees":

> I find that [the four probationary employees] were in the bargaining unit. Initially, I conclude that the probationary employees were within

the certified unit, which is described as "All production and maintenance employees" without any exclusions material here. More specifically, it was admitted by Respondent's counsel that the probationary employees "are production and maintenance employees . . . they do the same kind of work that the regular employees do." . . . Moreover, when the Union was certified in 1965, the probationary status of employees otherwise in the bargaining unit (as probationary production and maintenance employees would have been) would not have excluded them from the unit or rendered them ineligible to vote. . . . Also, while two of the probationary employees who worked on the day Respondent withdrew recognition (May 8, 1989) did not show up for work on the following day or at any time thereafter, this circumstance would not have rendered them ineligible to vote either on May 8 or on May 5, 1989, the day the petition was signed by certain nonprobationary employees and received by Respondent. . . .

Moreover, the bargaining agreement confirms the inherent probability that the parties intended the contract unit to encompass the entire certified unit. Thus, the contract itself defines the unit as "all employees within the bargaining unit as defined in the National Labor Relations Board in Case No. 9–RC-6474," and otherwise tracks the language of the certification. Probationary employees were entitled under the bargaining agreement to the "wage rates" specified therein, a condition which goes to the marrow of the employment relationship and as to which the Union could not lawfully bind either them or Respondent if the Union

> were not their bargaining representative. Moreover, under the bargaining agreement a nonprobationary employee's period of service included his probationary period for purposes of seniority and (perhaps) entitlement to vacation and holiday pay. The foregoing evidence that probationary employees were in the contract unit outweighs the evidence relied upon by Respondent. . . .
>
> In short, the only evidence offered by Respondent in support of its claim that the Union did not in fact enjoy majority status when Respondent withdrew recognition on May 8, 1989, is a petition signed by 16 employees in a unit of 34. A petition thus signed by fewer than half of the unit employees cannot be relied on as an expression of majority disaffection from the Union sufficient to support Respondent's claim of a reasonable and good-faith doubt of majority status. Nor can a claim of reasonable and good-faith doubt be supported by the legally erroneous belief of production control manager Thomas that the 4 probationary employees were not in the bargaining unit, in view of Respondent's knowledge of all the facts which showed that such employees were indeed in the unit.
>
> For the foregoing reasons, I find that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on May 8, 1989.

Administrative Law Judge's January 10, 1990 Decision at 6-8.

Thereafter, on August 16, 1990, the Board "affirm[ed] the judge's rulings, findings, and conclusions and adopt[ed] the [ALJ's] recommended Order." National

Labor Relations Board's August 16, 1990 Decision and Order at 1, which requires Holaender to recognize the representative status of, and bargain with, the Union.

The Board thereafter applied to this court for enforcement of its August 16, 1990 Order pursuant to 29 U.S.C. § 160(e).

II.

A.

"Upon certification by the NLRB as the exclusive bargaining agent for a unit of employees, a union enjoys an irrebuttable presumption of majority support for one year." *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987) ("[A]fter a union has been certified by the Board as a bargaining-unit representative, it usually is entitled to a conclusive presumption of majority status for one year following the certification."). "During that time, an employer's refusal to bargain with the union is *per se* an unfair labor practice under §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act." *Curtin Matheson Scientific, Inc.*, 110 S. Ct. at 1544. After the first year, the presumption of majority status continues, but is rebuttable:

> Under the Board's long-standing approach, an employer may rebut that presumption by showing that, at the time of the refusal to bargain, either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a "good faith" doubt, founded on a sufficient objective basis, of the union's majority support.

Id. at 1545.

Pursuant to the National Labor Relations Act's "overriding policy" of achieving "industrial peace," *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 38, 29 U.S.C. § 158(a)(5) provides that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of [its] employees." In *Fall River*, the Supreme Court held that the presumption of continuing majority support for a union:

> promot[es] stability in collective-bargaining, relationships, without impairing the free choice of employees. In essence, [it] enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. The presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees. The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.

Fall River Dyeing & Finishing Corp., 482 U.S. at 38-39 (citations omitted).

To prove an actual lack of majority support, the employer must make a numerical showing that a majority of employees opposed the union as of the date that union recognition was withdrawn. To prove reasonable doubt as to a union's majority status, the employer's doubt must be asserted in good faith and must be supported by

objective considerations. *See generally Curtin Matheson Scientific, Inc.*, 110 S. Ct. at 1550 n.8 ("The Board's requirement of some objective evidence indicating . . . opposition to the union does not amount to a requirement that the employer prove that the union *in fact* lacks majority status. To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union."); *Cain's Generator & Armature Co. v. NLRB*, 628 F.2d 933, 934 (6th Cir. 1980) ("In order to withdraw recognition, the employer must disprove majority support by a clear, cogent, and convincing showing of actual loss of majority status or objective considerations to support a good faith doubt of a union's majority status."). "[S]ubjective evidence may be used to bolster the argument that good faith doubts exist." *NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir.), *cert. denied*, 459 U.S. 994 (1982). Moreover, "[t]he relevant date to look to in determining the bona fide of the employer's doubts is the date that recognition is withdrawn; subsequent events cannot validate an improper withdrawal of recognition." *Id.* Accordingly, we must affirm the Board's findings regarding majority status (or good faith doubt as to majority status) if "on the record as a whole there is substantial evidence to support" the Board's determinations. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

In the instant action, the Board argues:

> Here, it is undisputed that the Union was the certified bargaining representative of the unit's employees; that the Company and the Union

> negotiated several successive collective-bargaining agreements, the most recent of which was for a three year term from June 1986 [through] May 31, 1989; and that on the afternoon of May 8, 1989, the Company withdrew recognition from the Union and has, since then, refused to bargain. Because the Union enjoyed a rebuttable presumption of majority status on May 8, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) unless it can prove its claim that it had at least a good-faith doubt reasonably grounded on objective factors that the Union no longer enjoyed majority status at the time recognition was withdrawn.
>
> The Company contends that its withdrawal of recognition on May 8 was justified by the 16-signature anti-union petition which it received on May 5. This contention is premised on the Company's assertion that the bargaining unit consisted of 30 employees. The Board, however, found that there were 34 employees in the unit including 30 non-probationary and 4 probationary employees. Thus, the Company's calculation concerning the Union's majority status was factually incorrect and failed to establish a reasonably-grounded good-faith doubt sufficient to justify its withdrawal of recognition.

Petitioner's Brief at 11-12. We agree.

Pursuant to the National Labor Relations Act, the Board must determine the appropriate bargaining unit for bargaining representative recognition (and withdrawal of recognition) purposes. *See* 29 U.S.C. § 159(b) ("The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for

the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."). *See also American Hosp. Ass'n v. NLRB*, 111 S. Ct. 1539, 1542 (1991) ("[W]henever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute."). In carrying out its statutory mandate to determine whether a decertification election is necessary pursuant to 29 U.S.C. § 159(c)(1), the Board recognizes that:

> In decertification cases the appropriate unit in which to conduct an election is the certified *or* contract unit. If the certified unit has been changed by contract, the Board relies upon the unit recognized by collective bargaining and on that basis holds an election to determine whether the employees wish to continue being represented.

Brom Machine & Foundry Co., v. NLRB, 569 F.2d 1042, 1043 (8th Cir. 1978) (quoting *Continental Can Co.*, 217 NLRB 316 (1975)).

At Hollaender, the unit certified by the Board in 1965 (and not altered by later collective bargaining agreements) consisted of:

> All production and maintenance employees of the Company at its plant and operations located at 10285 Wayne Avenue, Cincinnati, Ohio, 45215, including truckdrivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, guards and professional employees and supevisors [sic] as defined in the Act.

Joint Appendix at 86. As the petitioner correctly notes, "There is nothing in this language to suggest the exclusion of probationary production and maintenance employees." Petitioner's Brief at 14. In fact, Hollaender's attorney stipulated that the probationary employees perform the same work (and receive the same pay) as the non-probationary employees do. Moreover, because the collective bargaining agreement defines the probationary employees' conditions of employment, it logically follows that, by entering such an agreement, Hollaender and the Union impliedly agreed that the probationary employees were members of the bargaining unit represented by the Union.

As bargaining unit members, the four probationary employees would have been entitled to vote in a representation (or decertification) election held on May 5, the day the decertification petition was circulated, or on May 8, the day Hollaender refused to recognize the Union. Because substantial evidence supports the Board's finding that Hollaender's actions disenfranchised four eligible voters (a potentially determinative portion of the bargaining unit electorate), the Board correctly determined that Hollaender had violated the National Labor Relations Act. *See Bear Archery*, 223 NLRB 1169, 1172 (1976) ("[P]robationary employees are clearly included in the bargaining unit.").

B.

On August 16, 1990, the Board adopted the ALJ's recommended Order which stated (in relevant part):

Respondent Hollaender Manufacturing Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with [the Union] as the exclusive bargaining representative of Respondent's employees. . . .

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with [the Union] as the exclusive representative of the employees in the foregoing appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Joint Appendix at 149-50.

The Supreme Court has previously held that the Board must fashion an order that serves as "a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *NLRB v.*

Rutter-Rex Mfg. Co., 396 U.S. 258, 265 (1969). Because the Board's power to order remedies "is for the Board to wield, not for the courts," *Id.* at 263 (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)), "the remedial power of the Board is a 'broad discretionary one, subject to limited judicial review.' " *Id.* at 262-63 (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)).

Hollaender withdrew Union recognition at a time when Hollaender was not privileged to do so. Accordingly, the Board's Order restored the status quo by reestablishing the bargaining relationship. *See, e.g., Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944) ("[A] Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. But, as the remedy here in question recognizes, a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.").

Though the respondent argues that *Automated Business Sys. v. NLRB*, 497 F.2d 262 (6th Cir. 1974), supports its contention that the Board exceeded its authority by issuing a bargaining order, we disagree. In *Automated Business Sys.*, the Sixth Circuit questioned the propriety of a bargaining order following a decertification *election* (where the union was handily defeated). In the instant action, Hollaender refused to recognize, or bargain with, the

Union after unilaterally (and unlawfully) determining that the Union lacked majority support – the Board was not given the opportunity to conduct a decertification election prior to Hollaender's actions. Accordingly, the Board's directives ordering Hollaender to "cease and desist from refusing to recognize and bargain collectively" with the Union, and to "recognize and bargain with [the Union] as the exclusive representative of the employees," restore the status quo by reestablishing the bargaining relationship between Hollaender and the Union.

III.

For the aforementioned reasons, we enforce the Board's Decision and Order.

SCO

299 NLRB No. 59

D-1406
Cincinnati, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOLLAENDER MANUFACTURING COMPANY, INC.

and

Case 9-CA-26470

LOCAL LODGE 789, DISTRICT LODGE 34 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

DECISION AND ORDER

On January 10, 1990, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

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[1] In affirming the judge, Member Oviatt understands the judge in her remedy to have rejected any argument that the

(Continued on following page)

D-1406

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hollaender Manufacturing Company, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 16, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(Continued from previous page)

employees would have repudiated the Union even had the Respondent offered to the Union the guarantees it made directly to employees in its May 9 handout. A withdrawal of recognition is time specific in that at the moment an employer communicates its decision to withdraw recognition to the union the employer must have objective evidence that the union has lost its majority status. Here, the petition that the employees no longer wanted the Union to represent them was signed by 16 employees. The unit, however, included 30 regular employees and 4 probationary employees. Because the Respondent communicated its decision to withdraw recognition to the Union before the two probationary employees resigned on May 8, their resignations (which would have reduced the unit to 32 employees) were immaterial to the question whether the Respondent had an objective basis for withdrawing recognition at the time it communicated that withdrawal to the Union.

JD--308--89

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOLLAENDER MANUFACTURING COMPANY, INC.

and

Case 9-CA-26470

LOCAL LODGE 789, DISTRICT LODGE 34 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Mark Mehas, Esq., of Cincinnati, OH,
for the General Counsel.
Donald B. Hordes, Esq., of Cincinnati, OH,
for the Respondent.
Mr. Richard J. Carter, of Cincinnati, OH,
for the Charging Party.

DECISION

Statement of the Case

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Cincinnati, Ohio, on September 8, 1989, on the basis of a charge filed on May 24, 1989, by Local Lodge 789, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL-CIO, ("the Union") against Respondent Hollaender Manufacturing Company, Inc., and a complaint issued on July 12, 1989. The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, ("the Act") by withdrawing recognition from the Union, and thereafter

refusing to bargain with it, as the exclusive representative of certain employees of Respondent.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by Respondent and counsel for the General Counsel ("the General Counsel"), I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation which manufactures and sells structural fittings and related products at Cincinnati, Ohio. During the 12 months preceding the issuance of the complaint, Respondent sold and shipped from that facility products, goods, and materials valued at more than $50,000 directly to points outside Ohio. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. The Alleged Unfair Labor Practices

A. Background

On December 13, 1965, the Union was certified as the exclusive bargaining representative of the following admittedly appropriate unit:

> All production and maintenance employees employed by [Respondent] at its Cincinnati, Ohio facility including truck drivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, the parties had ongoing collective bargaining relations for several years and entered into a series of successive collective-bargaining agreements. The most recent of these agreements became effective in June 1986, and expired on May 31, 1989. The recognition clause of this agreement provided:

> The Company recognizes the Union as the sole and exclusive bargaining representative with respect to rates of pay, wages and other conditions of employment for all employees of the Company within the bargaining unit defined in [sic] the National Labor Relations Board in Case No. 9-RC-6474 as follows:
>
> > "All production and maintenance employees of the Company at its plant and operations located at 10285 Wayne Avenue, Cincinnati, Ohio, 45215, including truckdrivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, guards and professional employees and supervisors as defined in the Act."

That contract also provided:

> During the first three (3) months of continuous employment, a new employee shall be considered a probationary employee; he shall not be entitled to any of the benefits of this contract other than the wage rates, and his employment may be terminated at any time during such period. At the end of this probationary period he shall acquire seniority as of the date of his latest hiring.

Gary Thomas, Respondent's production control manager when he testified for Respondent on September 8, 1989, credibly testified that he had never had a situation where a probationary employee filed a grievance. Thomas was Respondent's production control manager as of May 5, 1989; the record fails to show when he began to work for Respondent at the plant in question. The 1986-1989 bargaining agreement provided, "Continuous service shall be broken and his employment shall terminate if the employee . . . is absent for work for three (3) days without having reported for work, unless he shall, before noon the day following such absence, present a written statement showing a justifiable reason for such absence . . . " Thomas testified that although nonprobationary employees cannot be fired for an absenteeism of less than 4 days, probationary employees can be terminated at any time.

The 1986-1989 bargaining agreement included a union-shop clause with a 30-day grace period. In practice, employees were not requested to join the Union until after they had completed their 90-day probationary period.

Prior to May 5, 1989,[1] Respondent and the Union had agreed to set up negotiation meetings for a new collective-bargaining agreement. The first meeting was scheduled for Monday, May 8.

B. The Employee Petition

As of about May 2, several of Respondent's employees were dissatisfied with the Union, and wanted to see if they "could have the Union go out." Inferentially in consequence of discussions among them, unit employee Phyllis Dugger, a member of the Union, telephoned the National Labor Relations Board's Cincinnati Regional Office at 4:15 or 4:30 p.m. on May 2 or 3. A male voice answered the telephone, and said, " . . . this is the Labor Relation Board" or the "Labor Relation Office." She told him that "some of the union membership at our company," which she did not identify by name, "wanted to find out what they should do to not have a union any more." He told her that "you start a decertification petition." Dugger, who impressed me as a wholly honest witness, testified for Respondent on direct examination:

> . . . he asked me how many members there were in this union at our company. I told him 30. He told me I needed ten percent of the signature – or ten people to sign this petition to be presented.

On cross-examination, she testified, "Ten percent of 30 people is what he told me." On redirect, when Respondent's counsel asked, "Did he say you needed ten

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[1] All dates hereafter are 1989 unless otherwise stated.

signatures or ten percent?" she replied, "Ten signatures – ten of 30 people." She did not ask the name of the person she talked to, he did not tell her, and she did not know it when she testified. The other party to this conversation did not testify. There is no evidence that Respondent knew about this conversation at any material time.

Thereafter, the following material was typed, by an individual unidentified in the record, at the top of a sheet of paper:

> DECERTIFICATION
>
> We the undersigned are rejecting Local Union 787. We no longer want them to represent us, the Hollander [sic] Manufacturing Inc., employee [sic].

At that time, Respondent had in its employ 30 employees who were in the bargaining unit, had completed their probationary period, and were union members; and 4 probationary employees (as defined in the contract) who performed the same kinds of work as the nonprobationary employees in the unit but were not union members so far as the record shows. Dugger asked at least 23 of the 30 union members to sign the petition. Sixteen of them, including Dugger, did so on May 5. This solicitation activity occurred within earshot of the probationary employees, none of whom offered or was requested to sign.

Late in the afternoon on May 5, production control manager Thomas, admittedly a supervisor, saw this document, bearing the 16 signatures, on the desk of production foreman Marvin Kates, admittedly a supervisor.

Thomas thereupon informed David Echert, Respondent's executive vice president and admittedly a supervisor, that "there was a petition to decertify the Union." Then, Thomas telephoned company attorney Donald B. Hordes and asked him how to proceed. Thomas said that Respondent had a petition that had 16 signatures. Hordes asked how many employees Respondent had. Thomas replied that respondent had 30 "union employees . . . So we didn't have a majority."

C. The Withdrawal of Recognition

Pursuant to arrangements made for a first bargaining session, the parties met at Hordes' office on Monday, May 8, at approximately 3 p.m. Present for the Union were two union stewards, neither of whom had signed the petition,[2] and the union business agent. Present for Respondent were, among others, Thomas, Echert, and Hordes. Hordes advised the Union that based on Respondent's earlier receipt of the petition, it would no longer bargain with the Union. Respondent expressed its belief that a majority of the bargaining unit employees, 16 out of 30, no longer wished to be represented by the Union. In making the statement, Respondent was operating under the assumption that probationary employees did not count towards the total number of bargaining unit employees in computing whether or not the Union had a majority.[3]

---

[2] The record fails to show whether they had been asked to sign.

[3] My findings under this heading are based on a stipulation between the parties.

D. Events after the Withdrawal of Recognition

The work day of May 8 ended at 3:30 p.m., about a half hour after Respondent withdrew recognition. Two of the probationary employees who worked that day did not show up for work on May 9 or at any time thereafter. On May 9, employee Ray Schneider asked to have his name deleted from the petition, and his name was crossed off that same day. That same day, nonprobationary unit employee Pat Fannon added her name to the petition. The record fails to show whether the foregoing action by Schneider or Fannon took place before or after Respondent circulated to all its employees (inferentially, including the probationary employees), at lunchtime on May 9, the following handout bearing that date and signed by Echert (emphasis in original):

> To all of The Hollaender Mfg. Co. shop employees:
>
> On Friday May 5, 1989, we received a petition signed by a majority of you stating that you no longer wanted the Machinists Union to represent you for the purpose of collective bargaining.
>
> Based on this employee sentiment, we informed the union at our first bargaining session on Monday, May 8, 1989 that we were now unwilling to enter into negotiations for a new labor agreement.
>
> We will, of course, continue to abide by the current union contract which expires on May 31, 1989. After that time, however, we will no longer recognize the Machinists Union as your bargaining representative.

> One immediate consequence of all of this is that effective June 1, 1989, we will no longer be deducting union dues of $20.15 per month from your pay check. Secondly, we will implement a new salary package for all of our machine shop employees which will be competitive with other similar companies in the Cincinnati metropolitan area, and which also recognizes your past and current contributions to The Hollaender Mfg. Co.
>
> YOU WILL NOT LOSE ANY OF THE SALARY AND FRINGE BENEFITS YOU CURRENTLY ENJOY.
>
> We will provide further details concerning your salary and benefits in the next couple of weeks.
>
> In the meantime, thanks for your continued patience and support.

N. Haro, B. Shamel, and H. Jones, all of whom were nonprobationary employees in the unit throughout May 1989 and none of whom had signed the decertification petition, were separated as of June 9, June 16, and August 4, respectively. No new employees were hired between April 19, 1989, and the hearing on September 8, 1989.

Of the 21 production and maintenance employees hired by Respondent between January 3, 1989, and the September 1989 hearing, about 14 (including the 3 who were separated in May 1989) failed to complete their 90-day probationary period.

E. Analysis and Conclusions

Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority support

during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may lawfully do so (1) if he can show that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) if he can show that his withdrawal of recognition was predicated on a good faith and reasonably grounded doubt (based on objective considerations) of the union's majority status at that time. *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 107 S.Ct. 2225, 2233 (1987); *N.L.R.B. v. Flex Plastics, Inc.*, 726 F.2d 272, 275 (6th Cir. 1984); *Colfor, Inc.*, 282 NLRB 1173, 1175 (1987), enfd. 838 F.2d 164 (6th Cir. 1988); *Bennett Packaging Company of Kentucky, Inc.*, 285 NLRB No. 80, JD slip op. 11 (August 31, 1987); *Station KKH1*, 284 NLRB No. 113, slip op. 4 (July 27, 1987), enfd. – LRRM – (9th Cir. 1989). The relevant date at which to consider the *bona fides* of the employer's doubts is the date that recognition is withdrawn. *Flex Plastics, supra*, 726 F.2d at 275. Respondent evinces semantic confusion in arguing (br. p. 7) (emphasis in original), "The issue in a loss-of-majority case is invariably the extent to which the majority of the employees have *withdrawn* their support from the union. Indeed, the instant decertification petition stated that the incumbent employees 'no longer want' the Union to represent them." Rather, the issue in such a case is whether, at the critical time, it can be shown that the union in fact failed to posses majority status. For example, in the case at bar, Respondent's position would not have been undercut by evidence that none of the signatories had ever wanted the Union to represent them, and that all of them had joined the Union

solely because of the union-shop clause and for the purpose of keeping their jobs.

Respondent contends that its withdrawal of recognition on May 8, 1989, was justified by the 16-signature petition which it received on May 5. The General Counsel stipulated to the authenticity of the signatures on the petition, and does not appear to question that it would justify Respondent's withdrawal of recognition if the signatories constituted a majority of the employees in the certified unit. However, the General Counsel contends that this petition neither showed that a majority of the bargaining-unit employees did not want to be represented by the Union, nor constituted sufficient objective basis for a reasonable doubt of the Union's majority status, on the ground that the petition was signed by only 16 employees and the bargaining unit allegedly consisted of 34 employees – namely, 30 nonprobationary employees and 4 probationary employees.

Respondent concedes (brief p. 6) that "probationary employees generally are deemed eligible to vote in a representation election." See, e.g., *Johnson's Auto Spring Service*, 221 NLRB 809 (1975); *Erie Marine Division, The Rust Engineering Company*, 195 NLRB 815, 816 (1972); and cases cited. However, Respondent contends that such cases are irrelevant here, on the ground that the 4 probationary employees here in question were allegedly not in the bargaining unit. Contrary to Respondent, I find that they were in the bargaining unit. Initially, I conclude that the probationary employees were within the certified unit, which is describe as "All production and maintenance employees" without any exclusions material here.

More specifically, it was admitted by Respondent's counsel that the probationary employees "are production and maintenance employees . . . they do the same kind of work that the regular employees do;" I infer that probationary production and maintenance employees work together with nonprobationary production and maintenance employees, under the same supervision, and under the same physical employment conditions.[4] Moreover, when the Union was certified in 1965, the probationary status of employees otherwise in the bargaining unit (as probationary production and maintenance employees would have been) would not have excluded them from the unit or rendered them ineligible to vote. *National Torch Tip Co.*, 107 NLRB 1271, 1272-1273 (1954); *Sheffield Corp.*, 123 NLRB 1454, 1457-1458 (1959); *Erie Marine Division, the Rust Engineering Company, supra*, 195 NLRB at 816 (1972). Although Respondent points to the evidence that about 62 percent of the employees hired in 1989 before the September 1989 hearing failed to complete their probationary period, the eligibility of probationary employees does not turn on the proportion of such employees who, willingly or not, fail to continue in the employer's employ throughout the trial period. *National Torch, supra*, 107 NLRB at 1273; *Johnson's Auto Spring, supra*, 221 NLRB 809; *Extral Corp.*, 111 NLRB 878, 880 (1955). Also, while two of the probationary employees

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[4] Thomas credibly testified that Respondent makes safety equipment available to any employee, whether or not he is probationary. The 1986-1989 contract required Respondent to "continue its practice to furnish safety devices and protective clothing when the same may be required."

who worked on the day Respondent withdrew recognition (May 8, 1989) did not show up for work on the following day or at any time thereafter, this circumstance would not have rendered them ineligible to vote either on May 8 or on May 5, 1989, the day the petition was signed by certain nonprobationary employees and received by Respondent. *N.L.R.B. v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964); *N.L.R.B. v. Res-Care, Inc.* 705 F.2d 1461, 1471-1472 (7th Cir. 1983); *St. Elizabeth Community Hospital v. N.L.R.B.*, 708 F.2d 1436, 1444 (9th Cir. 1983); *Computed Time Corp.*, 228 NLRB 1243, 1250 – 1251 (1977), mod. 587 F.2d 790 (5th Cir. 1979); *Personal Products Corp.*, 114 NLRB 959, 961 (1955); see also, *Amoco Oil Corp.*, 289 NLRB No. 37 (June 21, 1988) (holding eligible to vote in a decertification election an employee who gave pre-election notice of his intention to retire post-election, whose last active day of work preceded the election, but who was on vacation during the election). Moreover, the bargaining agreement confirms the inherent probability (*Hill-Rom Company*, 297 NLRB No. 53, JD slip op. 18 – 19 (November 21, 1989)) that the parties intended the contract unit to encompass the entire certified unit. Thus, the contract itself defines the unit as "all employees within the bargaining unit as defined in the National Labor Relations Board in Case No. 9-RC – 6474," and otherwise tracks the language of the certification. Probationary employees were entitled under the bargaining agreement to the "wage rates" specified therein, a condition which goes to the marrow of the employment relationship and as to which the Union could not lawfully bind either them or Respondent if the Union were not their bargaining

representative.[5] Moreover, under the bargaining agreement a nonprobationary employee's period of service included his probationary period for purposes of seniority and (perhaps) entitlement to vacation and holiday pay. The foregoing evidence that probationary employees were in the contract unit outweighs the evidence relied upon by Respondent as showing their exclusion – namely, the parties' practice of not requiring them to comply with the contractual union-security clause, and the contractual provision that they are not entitled to "any of the benefits of this contract other than the wage rates."[6]

In short, the only evidence offered by Respondent in support of its claim that the Union did not in fact enjoy majority status when Respondent withdrew recognition on May 8, 1989, is a petition signed by 16 employees in a unit of 34. A petition thus signed by fewer than half of the unit employees cannot be relied on as an expression of majority disaffection from the Union sufficient to support Respondent's claim of a reasonable and good-faith doubt of majority status. *Superior Bakery, Inc.*, 294 NLRB No. 21, slip op. 2 – 3 (May 25, 1989). Nor can a claim of reasonable and good-faith doubt be supported by the

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[5] I need not and do not determine whether this provision entitled them to the contractually specified overtime payments for weekend and holiday work and for more than 8 hours' work a day; to call-in or report pay; or to shift premiums. See *infra* fn. 6.

[6] I note that Respondent does not appear to contend that nonprobationary employees with less than 6 months' service are excluded from the unit by virtue of the contract clause excluding them from vacation benefits.

legally erroneous belief of production control manager Thomas that the 4 probationary employees were not in the bargaining unit, in view of Respondent's knowledge of all the facts which showed that such employees were indeed in the unit. *Pioneer Flour Mills*, 174 NLRB 1202 (1969), enfd. 427 F.2d 983 (5th Cir. 1970), cert. denied 400 U.S. 942 (1970); *Superior Bakery, supra*, slip op. 3 fn. 4, JD slip op. 12 – 14 (Fafard).

For the foregoing reasons, I find that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on May 8, 1989. I regard as immaterial the testimony of employee Dugger about her conversation with a Board agent before the petition was circulated. Because Respondent withdrew recognition before learning about this conversation, it could not have given rise to any equities in Respondent. Further, I conclude that neither did this conversation give rise to any relevant equities in Respondent's employees. Dugger did not testify that the Board agent told her that Respondent would be compelled, or even that it could choose, to withdraw recognition if presented with a petition signed by a majority of the Union membership. Moreover, whether she was told that to present a "decertification petition" required ten percent of the "members . . . in the union" (as she testified at one point) or "ten signatures . . . of 30 people" (as she eventually testified), she could not have supposed that the Union would be ousted by the signatures of 3 or even 10 employees among 30 union members. Rather, she must have realized that a "decertification petition" with so few signatures could not have displaced the Union without some intervening action by the Board.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its Cincinnati, Ohio facility including truck drivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. At all times between December 13, 1965, and at least through May 8, 1989, inclusive, the Union, by virtue of Section 9(a) of the Act, was the exclusive representative of the employees in the unit described in Conclusion of Law Number 3 with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on May 8, 1989, as the representative of the employees in the unit described in Conclusion of Law Number 3.

6. The unfair labor practices described in Conclusion of Law Number 5 affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Respondent contends that even if (as I have found) it violated the Act by withdrawing recognition from the Union on May 8, 1989, no bargaining order should be issued because, between that date and the hearing on September 8, 1989, all signers of the petition remained on the payroll, 6 nonsigners were separated, and no new bargaining-unit employees were hired. In consequence, at all times after May 8, 1989, half or more of the bargaining-unit employees consisted of employees who had signed the petition, and, of the 28 unit employees on the date of the hearing, 16 had signed the petition.[7] In thus relying on events which occurred after Respondent's unlawful withdrawal of recognition, Respondent overlooks the fact that "the unlawful refusal of an employer to bargain collectively with its employees' chosen representative disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions . . . for these reasons, a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own refusal to bargain." *Franks Brothers Co. v. N.L.R.B.*, 321 U.S. 702, 704-705 (1944); see also, *Fall River, supra*, 107 S.Ct. at 2239; *N.L.R.B. v. Katz*, 369 U.S. 736, 748, fn. 16 (1962); *Sterling Processing Crop.*, 291 NLRB No. 30, slip op. 9 – 10 (September 30, 1988). Moreover, when advising the employees generally that Respondent would not enter into negotiations with the Union for a

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[7] This figure of 16 includes Fannon, who added her name to the petition on May 9, but not Schneider, who deleted his name on the same day.

new labor agreement, Respondent's May 9 handout went on to say that in consequence, after the bargaining agreement expired the monthly dues of about $20 would no longer be deducted from employees' pay checks; that "we will implement a new salary package . . . which will be competitive with other similar companies in the . . . metropolitan area, and which also recognizes your past and current contributions" to Respondent; that (in capital letters) "YOU WILL NOT LOSE ANY OF THE SALARY AND FRINGE BENEFITS YOU CURRENTLY ENJOY;" and that Respondent "thanks" the employees for their "continued patience and support." It cannot be presumed that none of the petition-signers would have undergone a change of heart if, instead of promising employees a "new salary package" (on expiration of the existing contract) as what Respondent termed a "consequence" of Respondent's unlawful refusal to enter into negotiations for a successor contract, Respondent had offered the Union that same "package" as part of such a contract. Cf. *Katz, supra,* 369 U.S. at 745.

For the foregoing reasons, the customary remedial order will issue. Indeed, if no such order is issued, it is difficult to conceive of any other remedy. Apparently in anticipation of this difficulty, Respondent's brief relies on the Board's refusal to issue a remedial order in cases where the alleged unfair labor practice had been substantially remedied by the respondent's own conduct.[8]

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[8] *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show),* 202 NLRB 620 (1973); *United States Postal Service,* 205 NLRB 624 (1973). Cf. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) v. N.L.R.B. (Omni Spectra),* 427 F.2d 1330, 1332 – 1334 (6th Cir. 1970).

However, so far as the record shows, Respondent has taken no remedial action here. Nor can an unlawful withdrawal of recognition from a Board-certified union be fairly characterized as a "*de minimis*" or "technical" violation of the Act – and, therefore, unworthy of a remedy – in view of the statutory purpose (Section 1 of the Act) of "encouraging the practice and procedure of collective bargaining." No different result is indicated by *Burger Pits, Inc.*, 273 NLRB 1001 (1984), affd. 785 F.2d 796 (9th Cir. 1986), cited by Respondent. In that case, the employer withdrew recognition, and effected unilateral changes in certain conditions of employment, after having received a petition which bore at least the purported signatures of 70 percent of the unit employees, but about 4 weeks before the expiration of the current bargaining agreement. Although issuing a cease-and desist and make-whole order with respect to the period which the contract was still in effect, the Board declined to issue a prospective bargaining order, on the ground that the employer could have lawfully announced on receipt of the petition an intention not to bargain with the union for a new contract, and upon the expiration of the contract withdrawn recognition from the union and effected unilateral changes. In the instant case, Respondent's statement to the Union that Respondent would no longer bargain with it was made at a time when the Union was not shown to possess minority status.

In addition, Respondent will be required to cease and desist from the unfair labor practices found, and like or related conduct, and to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended Order:[9]

ORDER

Respondent Hollaender Manufacturing Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Local Lodge 789, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of Respondent's employees in the following appropriate unit:

> All production and maintenance employees employed by Respondent at its Cincinnati, Ohio, facility including truck drivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with Local Lodge 789 as the exclusive representative of the employees in the foregoing appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD--308--89

Dated, Washington, D.C. January 10, 1990.

/s/ Nancy M. Sherman
Nancy M. Sherman
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing where all parties had the opportunity to present their evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Local Lodge 789, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Local Lodge 789 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

JD--308--89

All production and maintenance employees employed by us at our Cincinnati, Ohio facility including truck drivers, building maintenance man, shipping and receiving clerk and all other plant clerical employees, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

HOLLAENDER MANUFACTURING CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio, 45202-3721, Telephone 513-684-3003.

JD--308--89

No. 90-6288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	ORDER
Petitioner,	)	(Filed Oct. 1, 1991)
v.	)	
HOLLAENDER MANUFACTURING COMPANY, INC.,	)	Leonard Green, Clerk
Respondent	)	

BEFORE: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(2)

No. 91-949

FILED
FEB 3 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

HOLLAENDER MANUFACTURING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly ordered petitioner to resume bargaining with the union as a remedy for petitioner's unlawful withdrawal of recognition from the union.

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In the Supreme Court of the United States

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No. 91-949

HOLLAENDER MANUFACTURING CO., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-17a, is reported at 942 F.2d 321. The opinion and order of the National Labor Relations Board, Pet. App. 18a-19a, and the decision of the administrative law judge, Pet. App. 20a-42a, are reported at 299 N.L.R.B. No. 59.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1991. A petition for rehearing was denied on October 1, 1991. Pet. App. 43a. The petition for a writ of certiorari was filed on November

13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that manufactures and sells structural fittings and related products. Since December 13, 1965, Local Lodge 789, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), has been the certified bargaining representative of petitioner's production and maintenance employees. Pet. App. 20a-21a. Petitioner and the Union entered into a series of collective-bargaining agreements, the most recent of which expired on May 31, 1989. *Id.* at 22a. Prior to May 5, 1989, petitioner and the Union agreed to begin negotiations for a new contract on May 8, 1989. *Id.* at 24a.

On May 5, 1989, a bargaining-unit employee, Phyllis Dugger, circulated among her fellow unit employees a petition captioned, "DECERTIFICATION," and containing the following statement: "We the undersigned are rejecting Local Union [789]. We no longer want them to represent us, the [Hollaender] Manufacturing Inc., employee[s]." Pet. App. 25a. Dugger asked at least 23 of 30 nonprobationary employees, who were members of the Union and the bargaining unit, to sign the petition. Sixteen of the employees, including Dugger, signed. Dugger solicited the signatures in the presence of four probationary employees, but did not ask them to sign the petition. None of them volunteered to do so. *Ibid.*

Petitioner learned of Dugger's petition prior to the scheduled May 8 bargaining session. Operating on the premise that the four probationary employees did not count towards the number of bargaining unit

employees, petitioner advised the Union at the May 8 session that it was withdrawing recognition because 16 out of 30 unit employees had signed the petition. Petitioner also represented that it would no longer bargain with the Union. Pet. App. 26a.

On May 9, 1989, two of the probationary employees failed to report for work and did not return to petitioner's employ thereafter. The same day, at unspecified times, one employee removed his name from the decertification petition, and another employee added her name. Pet. App. 27a. At lunch time, petitioner circulated to its employees the following handout signed by its vice president:

> To all of the Hollaender Mfg. Co. shop employees:
>
> On Friday May 5, 1989, we received a petition signed by a majority of you stating that you no longer wanted the Machinists Union to represent you for the purpose of collective bargaining.
>
> Based on this employee sentiment, we informed the union at our first bargaining session on Monday, May 8, 1989 that we were now unwilling to enter into negotiations for a new labor agreement.
>
> We will, of course, continue to abide by the current union contract which expires on May 31, 1989. After that time, however, we will no longer recognize the Machinists Union as your bargaining representative.
>
> One immediate consequence of all of this is that effective June 1, 1989, we will no longer be deducting union dues of $20.15 per month from your pay check. Secondly, we will implement a new salary package for all of our machine shop employees which will be competitive with other similar companies in the Cincinnati metropolitan

area, and which also recognizes your past and current contributions to The Hollaender Mfg. Co.

YOU WILL NOT LOSE ANY OF THE SALARY AND FRINGE BENEFITS YOU CURRENTLY ENJOY.

We will provide further details concerning your salary and benefits in the next couple of weeks.

In the meantime, thanks for your continued patience and support.

Id. at 27a-28a.

2. The Union filed an unfair labor practice charge with the Board based on petitioner's withdrawal of recognition and refusal to bargain, and the Board's General Counsel issued a complaint. The ALJ concluded that petitioner had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from the Union. Pet. App. 34a. The ALJ found that the four probationary employees were part of the bargaining unit when the petition was signed on May 5 and when petitioner withdrew recognition from the Union on May 8. Because the 16 signatures collected on the petition therefore reflected a minority of 34 unit employees (30 nonprobationary and four probationary), the ALJ determined that petitioner lacked a reasonable and good faith doubt about the Union's majority status that justified petitioner's withdrawal of recognition. Pet. App. 30a-33a.

With respect to the remedy, petitioner contended that, even if it had violated the NLRA by withdrawing recognition of the Union on May 8, no bargaining order should issue because of subsequent events. Between May 8, 1989, and the hearing before the ALJ

on September 8, 1989, six of the unit employees who had failed to sign the petition left petitioner's employ, but all of the employees who had signed the petition remained with petitioner and no new unit employees were hired. Hence, petitioner claimed, at all times after May 8, 1989, half or more of the bargaining unit employees were employees who had signed the decertification petition. Pet. App. 36a.

The ALJ rejected petitioner's argument that she should base her remedial order on the events following petitioner's unlawful withdrawal of recognition. First, citing *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-705 (1944), the ALJ observed that the unlawful refusal to bargain has an adverse effect on employee morale and discourages union membership. Pet. App. 36a. Second, the ALJ noted that petitioner's May 9 handout advising employees of its withdrawal of recognition explained that (a) monthly union dues of about $20 would no longer be withheld, (b) petitioner would now implement a competitive, new "salary package" recognizing each employee's "past and current contributions," and (c) no employee would lose any current salary or fringe benefits. *Id.* at 36a-37a. The ALJ was unable to presume that none of the employees who had signed the petition would have withdrawn his or her name if petitioner had offered the new package to the Union during the scheduled negotiations, rather than offering it as a consequence of petitioner's unlawful refusal to bargain. *Id.* at 37a.[1] The ALJ entered a proposed order directing petitioner to recognize and bargain with

[1] The ALJ noted that on May 9 an employee who had signed the petition withdrew his signature, but another employee added hers. Pet. App. 36a n.7. Thus, employee sentiment on the issue of union representation remained in flux.

the Union, *id.* at 39a-41a, and the Board affirmed, *id.* at 18a-19a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-17a. The court agreed with the Board that petitioner lacked a reasonably grounded, good faith doubt concerning the Union's majority status when it withdrew recognition. *Id.* at 12a. In so holding, the court affirmed the finding that the four probationary employees were part of the bargaining unit. *Id.* at 13a-14a. The court also upheld the bargaining order adopted by the Board, reasoning that the Board acted within its broad remedial discretion by restoring the status quo as of the time petitioner unlawfully withdrew recognition of, and refused to bargain with, the Union. *Id.* at 16a-17a.

ARGUMENT

Petitioner does not challenge in this Court the Board's finding that petitioner unlawfully withdrew recognition from the Union on May 8, 1989. Rather, petitioner claims only that the Board abused its discretion in issuing a bargaining order under the circumstances of this case. The court of appeals' decision enforcing the Board's order is consistent with the decisions of this Court and does not conflict with the decisions of any other court of appeals; review by this Court is unwarranted.

1. Petitioner contends that the Board acted unlawfully by issuing a bargaining order because, subsequent to petitioner's unlawful withdrawal of recognition of the Union, the Union lost its majority status through no fault of petitioner's. Pet. 10-15. That contention is foreclosed by *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944), in which this Court recognized the Board's authority to issue a bargain-

ing order even though the union's majority had been eroded "in the normal course of business" before the remedial order was issued. *Id.* at 703. The Court reasoned that such an order was justified because an unlawful refusal to bargain "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Id.* at 704. In addition, the Court explained, "a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain," perhaps giving them an incentive to delay proceedings before the Board. *Id.* at 704-705. Finally, the Court did not regard the bargaining order as unfair to those employees who might desire a different bargaining representative; the bargaining relationship established by such an order persists only for "a reasonable period in which it can be given a fair chance to succeed." *Id.* at 705.

Petitioner contends that *Franks Bros.* is inapposite because the dissipation of the Union's majority status in this case did not result from petitioner's unfair labor practice. Pet. 13-15. Even if petitioner's characterization of the reasons for the disproportionate departure of nonsigners of the petition were accurate,[2] it would not render *Franks Bros.* inapplicable here.

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[2] Petitioner asserts the employees who left petitioner's employ did so for reasons "unrelated to the withdrawal of recognition." Pet. 11. That assertion is without record support. None of the employees who left petitioner's employ after the withdrawal of recognition had signed the decertification petition; absent any indication to the contrary, it is plausible to infer that some of them may have been influenced by petitioner's unlawful elimination of the union representation that they had previously enjoyed.

Although the unfair labor practices in *Franks Bros.* involved aggressive acts calculated to dissipate employee support for the union, the issue before the Court was whether the Board properly issued a bargaining order after employees crucial to the union's majority were "replaced by new employees *in the normal course of business.*" 321 U.S. at 703 (emphasis added). Contrary to petitioner's argument, therefore, *Franks Bros.* decided the very issue in this case—whether the Board has authority to issue a bargaining order despite changed circumstances following an unlawful refusal to bargain.

Petitioner misplaces reliance, Pet. 7, 12-13, on *Garment Workers* v. *NLRB*, 366 U.S. 731 (1961), in which the Court found a violation of the NLRA where the employer recognized a union on the mistaken belief that the union enjoyed majority status. *Id.* at 738-740.[3] As petitioner concedes, Pet. 13, this

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[3] *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987), upon which petitioner also heavily relies, Pet. 12, is similarly inapposite. In that case, the Court merely indicated that a successor employer violates the NLRA if it recognizes the union representing the predecessor employer's workers before the successor has employed a "substantial and representative complement" of those employees. 482 U.S. at 51 n.18. Petitioner's citation, Pet. 10, of *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), is also misplaced; the *Gissel* Court recognized that "the Board has the * * * authority [to issue a bargaining order] even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered." *Id.* at 610 (citing *Franks Bros.*). And *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990), also cited by petitioner, Pet. 10, involved a substantive question regarding the presumption of a union's continuing majority status; *Curtin Matheson* has no bearing on the remedial question presented here.

Court has never extended *Garment Workers* to limit the Board's remedial discretion to issue a bargaining order following an employer's unlawful withdrawal of recognition from a duly certified union. Nor should it do so here. The NLRA's "overriding policy" of industrial peace is promoted by fostering stable bargaining relationships. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 38-39 (1987). In the present remedial context, the Board is properly vindicating a lawfully established—and presumptively continuing, *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972)—bargaining relationship by permitting it to operate for a reasonable period after petitioner's unlawful withdrawal of recognition disrupted it.[4]

Petitioner also errs in maintaining, Pet. 11, that "there is no causal relationship" between its unfair labor practices and the Union's alleged subsequent loss of majority status. After petitioner withdrew recognition of the Union, it issued a notice informing all the employees of its action. That notice advised the employees that two consequences of petitioner's withdrawal of recognition were that petitioner (1) would no longer withhold monthly union dues of about $20, and (2) would implement a "new salary package" to be "competitive with other similar companies" and to recognize each employee's "past and current contributions." Pet. App. 28a. The notice also made clear that no employee would lose any cur-

[4] Petitioner wholly ignores that interest when it argues, Pet. 11, that the Board should have disregarded the Union's majority status as of May 8, 1989—when petitioner withdrew recognition of the Union—because at all times thereafter at least half of the remaining unit employees were signatories of the petition.

rent salary or fringe benefits because of the withdrawal of recognition of the Union. *Ibid.* Even after the withdrawal of recognition of the Union, employee sentiment remained somewhat in a state of flux. *Id.* at 36a n.7 (noting that on May 9, 1989, one employee added her name, and one substracted his name, from the petition). As the ALJ observed, "[i]t cannot be presumed that none of the petition-signers would have undergone a change of heart if, instead of promising employees 'a new salary package' (on expiration of the existing contract) as what [petitioner] termed a 'consequence' of [its] unlawful refusal to enter into negotiations for a successor contract, [petitioner] had offered the Union that same 'package' as part of such a contract." *Id.* at 37a. There is no basis for petitioner's naked assertion that its unlawful withdrawal of recognition bore no relationship to any manifestation of majority sentiment against representation by the Union after May 8, 1989.

2. Petitioner contends that the decision of the court of appeals conflicts with the decisions of three other courts of appeals. Pet. 15-18. The cases cited by petitioner do not support that contention.

In *Peoples Gas System, Inc.* v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980), "an extraordinary amount of time" —nearly five and a half years—had elapsed between the employer's initial refusal to bargain and the Board's issuance of a bargaining order. *Id.* at 47. In the interim, the union had filed a petition for a representation election, which it lost decisively in May 1975. *Id.* at 40. In holding that the Board had abused its discretion by issuing a bargaining order in that case, the court emphasized not only the "extraordinary delay" between the initial refusal to bargain and the formulation of the remedy, but also "the

clear, uncoerced expression" of employee sentiment reflected in the intervening election. *Id.* at 48. Neither consideration is present here.[5]

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[5] Contrary to petitioner's suggestion, Pet. 16, the District of Columbia Circuit's decision in *St. Agnes Medical Center* v. *NLRB*, 871 F.2d 137 (1989), is not inconsistent with the decision below. There, the Board issued a bargaining order after finding that the employer had engaged in various unfair labor practices during and after a decertification election. *Id.* at 141-143. The court vacated the Board's order and remanded for further consideration. First, the court disagreed with the ALJ's conclusion that the election had been tainted by massive employer violations of the NLRA; rather, it perceived "a decertification campaign that was vigorously contested by both sides, in the course of which the [employer] stepped over the line a number of times." *Id.* at 148. Particularly in view of its disallowance of certain of the ALJ's findings of unfair labor practices, the court directed the Board on remand to reassess the cumulative impact of the violations and consider whether they could be remedied by a rerun election. *Ibid.* Second, the Board had based its bargaining order in part on the employer's unilateral change in the terms and conditions of employment after the election. The court, however, vacated that predicate finding on the merits and remanded for the Board to reconsider whether, notwithstanding the unfair labor practice findings upheld by the court, the employer had a good faith doubt concerning the union's majority status when it made the changes. *Ibid.* Petitioner points to no grounds for questioning the factual predicates of the Board's remedial order in this case. While the court in *St. Agnes* also noted that the Board should have conducted a more detailed analysis of why a bargaining order (as opposed to a rerun election) was a necessary remedy, *id.* at 148-149, that observation does not bring *St. Agnes* into conflict with the present case. Here, the ALJ gave a careful explanation of how petitioner's withdrawal of recognition and proposed revision of the terms and conditions of employment made it impossible to rely on the petition as an accurate indicator of untainted employee sentiment regarding the Union. Pet. App. 36a-37a. The Board adopted that determination. *Id.* at 18a-19a.

Similarly, in *NLRB* v. *Laverdiere's Enterprises*, 933 F.2d 1045, 1054-1055 & n.8 (1st Cir. 1991), nearly three and a half years had passed between the ALJ's determination and the Board's decision, six years had elapsed between the refusal to bargain and the court's decision, and only 28 of the 70 affected unit employees remained in the work force. And in *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398 (5th Cir. 1991), over four years had passed between the ALJ's determination and the Board's decision, the union had not represented the employees for over six years when the court rendered its decision, and, subsequent to the ALJ's decision in 1985, a majority of employees had expressed opposition to representation by the union. *Id.* at 404-405. No similar circumstances militating against the issuance of a bargaining order exist in this case.[6]

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[6] Here, the Board issued its order approximately 15 months after petitioner's unlawful refusal to bargain, and slightly more than seven months after the ALJ's decision. The court of appeals' decision was issued two years and three months after petitioner's unlawful action. There is nothing in the record to indicate a substantial change in the composition of the bargaining unit or a clear and untainted expression of employee sentiment against being represented by the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-949

In The

Supreme Court of the United States

October Term, 1991

HOLLAENDER MANUFACTURING COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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1. In its Brief in Opposition, Respondent has made its position absolutely clear. It adheres to *Franks Bros. Co. v NLRB*, 321 U.S. 702 (1944). Once an employer unlawfully withdraws recognition from an incumbent union, a remedial bargaining order *must* issue, irrespective of the passage of time, irrespective of the wishes of the uncoerced majority of its employees, irrespective of any changed circumstances whatsoever. When weighed against the union's interest in stable bargaining relations, the uncoerced desire of employees to be free of union representation is given little, if any, consideration.[1]

Franks makes for good law where an employer commits coercive independent unfair labor practices which cause the anti-union disaffection in the first place. In such cases, the employer should not be permitted to benefit by its own misconduct. But here, Petitioner did not commit such unfair labor practices. The 16 employees who manifested their anti-union sentiment did so prior to and independent of Petitioner's unlawful withdrawal of recognition.

There is also some merit in forcing the maintenance of the bargaining relationship in the wake of an unlawful withdrawal of recognition where the pro-union

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[1] The maintenance of stable bargaining relationships was also echoed by the Supreme Court in *Fall River Dyeing and Finishing Corp. v NLRB*, 482 U.S. 27 (1987) and *NLRB v Burns International Security Services, Inc.*, 406 U.S. 272 (1972). Resp. 9. However, these cases addressed facts and issues far different from those present here. Neither *Fall River* nor *Burns* faced the issue of employees expressing their desire not to be represented by a union.

employees were "replaced by new employees in the normal course of business." 321 U.S. at 703. Resp. 8. However, unlike "replacement employees," whose union views may be unknown or ambiguous, the solid nucleus of 16 employees in the instant case soundly rejected union representation prior to any withdrawal of recognition. More importantly, these 16 anti-union employees remained anti-union as the entire employee complement grew smaller. Within hours of the employer's refusal to bargain on May 8, 1992[2], the 16 anti-union employees became 50% of the workforce. Within a few weeks thereafter, this group of 16 became a clear anti-union majority within the workforce.

2. Respondent's attempt to distinguish the circuit court cases contrary to its position,[3] is not convincing. Respondent contrasts the several year time gap between the refusal to bargain and the Court's order in those cases with the instant case, where "only" two-and-three-quarter years have elapsed since the date the Respondent withdrew recognition in May of 1989. However, in judging whether union support amongst employees has effectively dissipated over time, there is little qualitative difference between a two-and-three-quarters and a six-year time lapse.

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[2] Two probationary employees quit their employment at the end of the very business day in which the refusal to bargain took place.

[3] *People's Gas System v NLRB*, 629 F.2d 35 (D.C. Cir. 1980); *St. Agnes Medical Center v NLRB*, 871 F.2d 137 (D.C. Cir. 1989); *NLRB v Laverdiere's Enterprises*, 933 F.2d 1045 (1st Cir. 1991); *Texas Petrochemicals Corp. v NLRB*, 923 F.2d 398 (5th Cir. 1991).

Furthermore, the passage of time was only one factor relied upon by the circuit courts in these cases, and hardly the determining one. Respondent has glossed over the extended discussion by the circuit courts in these cases as to the need to balance institutional interests of the unions in the stability of bargaining relationships against the fundamental right of employees, as guaranteed by Section 7 of the National Labor Relations Act, to exercise free choice as to union representation. The employees' anti-union sentiment in this case was no less vigorous and unmistakable than that of the employees in these other cases. Employees can express their wishes to be free of union representation equally through decertification elections or uncoerced anti-union petitions.

3. Respondent minimizes the nucleus of 16 anti-union employees which ultimately became an anti-union majority by arguing that their disaffection from the union was caused, or at least perpetuated, by Petitioner's handout to its employees on noon of May 9, 1989, the day *after* the Petitioner's withdrawal of recognition from the union, and several days *after* the 16 employees voiced their uncoerced desire to be free of union representation.

Respondent cites the reasoning of its own Administrative Law Judge that

> [i]t cannot be presumed that none of the petition-signers would have undergone a change of heart if, instead of promising employees "a new salary package" (on expiration of the existing contract) as what [petitioner] termed a "consequence" of [its] unlawful refusal to enter into a negotiation for a successor contract, [petitioner] had offered the union that same "package" as

> part of such a contract. . . . There is no basis for petitioner's naked assertion that its unlawful withdrawal of recognition bore no relationship to any manifestation of majority sentiment against representation by the union after May 8, 1989.

Resp. 10.

There are several flaws in Respondent's argument:

A. First and foremost, it is pure conjecture. Respondent appears to be saying that if only Petitioner had continued to bargain with the union and implemented a salary and fringe benefit package as part of the union contract, all or most of the anti-union petition signers may have had a "change of heart" and supported the union. However, the 16 employees affixed their signatures to the anti-union petition *prior to* the withdrawal of recognition and circulation of the handout precisely because they did *not* want to be represented by the union for collective bargaining purposes and did *not* want the union to negotiate another contract on their behalf. The Respondent can cite no factual predicate whatsoever in this record to indicate that employees would have suddenly switched allegiance to the union had Petitioner signed a contract with the union. Equally speculative is Respondent's reasoning that those employees who did not sign the anti-union petition and ultimately left the employment of Petitioner "may have" been influenced by the Petitioner's earlier withdrawal of recognition from the union. Resp. 7, n.2.

B. Even if the May 9 handout had an effect on the employees generally, it could not possibly have had a detrimental effect on the two probationary employees

who quit mere hours after Petitioner informed the union on the afternoon of May 8, 1989 that it was withdrawing recognition. Since the union no longer commanded a majority of bargaining unit employees as of the end of the workday on May 8, the distribution of the handout on May 9 had no effect whatsoever on the union's non-majority status.

C. There is nothing improper in the distribution of the handout anyway. The bargaining unit employees were naturally confused as to the status of the union and union negotiations. Petitioner had every reason to advise employees of the withdrawal of recognition, and how it would impact their terms and conditions of employment. Advising employees that after the expiration of a contract there would no longer be a wage deduction for union dues was indeed a factual statement.[4] It was also a legitimate personnel practice for Petitioner to advise employees that they would not lose any of their current salary and fringe benefits and that a new salary and fringe benefit package would ultimately be implemented. Nor was it an error for the Petitioner to thank its employees for their patience and support. Petitioner did not berate the union or its supporters. Petitioner did not selectively praise only those employees who signed the anti-union petition but rather all of the employees for bearing up under the uncertainty. To not so communicate

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[4] The Respondent has held that dues checkoff and union security provisions do not survive the expiration of a collective bargaining agreement. See, *e.g., Robbins Door and Sash Co.*, 260 NLRB 659 (1982); *Peerless Roofing Co.*, 247 NLRB 500 (1980).

with the employees under these unusual circumstances would have been foolhardy.

D. Respondent's reference to the May 9 handout as coercing employees in their free choice is most disturbing. Respondent has cited no authority that the handout was improper or coercive. Indeed, it was never the subject of an unfair labor practice charge or complaint. Its legality was never litigated in an unfair labor practice proceeding. Hence, it is altogether improper for Respondent to argue now the coerciveness of the handout.

Therefore, for all these reasons, the May 9 handout provides no causal link between the Petitioner's withdrawal of recognition from the union, and the employees' disaffection with the union.

4. This case presents a fundamental clash between two conflicting and equally legitimate interests: (1) the stability of bargaining relationships, and (2) the right of employees to freely choose whether they desire union representation. However, Respondent views the interest of stable bargaining relations as "overriding policy". Resp. 9. Respondent's position is absolute, static and mechanistic. Once an employer withdraws recognition from the union, the Respondent puts on blinders, ignores all of the circumstances which take place thereafter and reflexively issues a bargaining order. The uncoerced feelings of the employees are of little moment. This is hardly the effectuation of the National Labor Relations Act which has traditionally regarded the exercise of employee free choice as paramount.

Franks is almost 50 years old. It is perhaps time for this Court to re-examine *Franks* in light of *Garment Workers v NLRB*, 366 U.S. 731 (1961) and redefine or clarify the extent to which Respondent's overriding interest in the stability of industrial relations should more fully accommodate the right of employees to choose or reject union representation. Such review is especially timely since several circuit courts have differed markedly in their recent attempts to reconcile these two competing interests.

This case presents an ideal vehicle for the Court to redress this balance.

Respectfully submitted,

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